Overnite Transportation Company *and* Clarence Miller. Case 14-CA-14357

April 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On March 31, 1981, Administrative Law Judge Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order as modified herein.[3]

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Nor do we find merit in Respondent's contention that, because the Administrative Law Judge generally discredited its witnesses and credited the General Counsel's witnesses, his credibility resolutions were attended by prejudices. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." In any event, portions of the testimony of Respondent's witness, Robert Bartlett, were credited. (See ALJD, fn. 2.)

In fn. 1 of his Decision, the Administrative Law Judge inadvertently stated that the complaint was issued on November 22, 1980. The correct date is November 24. Fn. 4 of the Decision is unclear as to the number of days and/or hours Miller worked prior to his termination on June 6, 1980. A review of the record establishes that, during the 3 or 4 weeks prior to his termination, Miller worked either 4-day weeks or 5-day weeks, working only 6 hours per day. The normal workweek had been 40 hours, Monday through Friday.

[2] In agreeing with the Administrative Law Judge that Respondent refused to recall the Charging Party in violation of Sec. 8(a)(3) and (1) of the Act, we disavow the Administrative Law Judge's reliance on Terminal Manager Wilson's statement at the hearing that he did not then want to take Miller back as a factor indicating the refusal to recall violated the Act. Nonetheless, we are satisfied that the balance of the Administrative Law Judge's findings amply support his conclusion that the refusal to recall Miller violated the Act.

In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's conclusion that Respondent did not violate the Act as alleged in par. 4,B, of the complaint.

[3] In par. A,5, of his recommended Order, the Administrative Law Judge provided that Respondent shall cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Sec. 7 of the Act. However, the Board's policy is that such an order is warranted only where a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). We find that a narrow, rather than a broad, injunctive order is warranted in this case. We shall further conform the recommended Order and notice to the violations found by deleting par. B,2, from the recommended Order and notice.

Member Jenkins would award interest on any backpay award in accord with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Overnite Transportation Company, St. Louis, Missouri, it officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph A,5, of the recommended Order:

"5. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act."

2. Delete paragraph B,2, of the recommended Order in its entirety and conform the numbers of subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present witnesses, evidence, and arguments, the National Labor Relations Board has found that we, Overnite Transportation Company, have violated the National Labor Relations Act, as amended. We have therefore been ordered to post this notice and we intend to carry out the Order of the Board and to abide by the following.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT violate these rights of yours.

WE WILL NOT, in violation of the Act, inform you to postpone your union organizational efforts or activities.

WE WILL NOT, in violation of the Act, inform you that we are angry over your lawful distribution of union cards.

WE WILL NOT inform you, in violation of the Act, not to talk about the union or unionizing, among yourselves or with other employees.

WE WILL NOT discriminate against you, or interfere with, restrain, or coerce you in the free exercise of your rights under the Act, by failing or refusing to recall, reinstate, or rehire into our employ any employee because he or she has engaged in union or any other protected concerted activity lawful under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you under the Act.

WE WILL offer to Clarence Miller (also known as Clarence Edward Miller) immediate, full, and unconditional reinstatement to his former job of city driver in our St. Louis, Missouri, terminal (or, if not available, to a substantially equivalent job with us), without prejudice to his seniority, wages, benefits, and emoluments of every nature which would have been due or paid to him as if we had recalled, reinstated, and rehired him on August 4, 1980; and WE WILL make him whole for any loss of income (including overtime, holiday and vacation pay, and hospitalization and medical expenses and obligations) sustained by him by reason of our not having recalled, reinstated, and rehired him on and since August 4, 1980, plus interest.

All of our employees are free to talk among themselves or with others about unions, to join or not to join unions, to solicit others to join or not to join unions, or to engage or not to engage in other union or concerted activities, within and as protected by the National Labor Relations Act, as amended, without any discrimination, retaliation, interference, restraint, or coercion from us in any way, shape, or form.

OVERNITE TRANSPORTATION COMPANY

DECISION

PRELIMINARY STATEMENT; ISSUES

STANLEY N. OHLBAUM, Administrative Law Judge: This proceeding[1] under the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (called the Act), was litigated before me in St. Louis, Missouri, on January 7, 1981, with all parties participating throughout by counsel and afforded full opportunity to present evidence, arguments, proposed findings and conclusions, and post-trial briefs. A brief was received from General Counsel on February 9, 1981; none was received from Respondent. Record and brief have been carefully considered.

The principal issues are whether Respondent Employer violated Section 8(a)(1) of the Act through miscellaneous impermissible acts of interference with, restraint, and coercion of employees' Section 7 rights, as well as Section 8(a)(3) and (1) through discharging and failing and refusing to recall, reinstate, or reemploy an employee, because of his union and concerted activities protected under the Act.

Upon the entire record and my observation of the testimonial demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

At all material times, Respondent has been and is a Missouri corporation engaged in providing interstate transportation of freight and commodities, with facilities in St. Louis (specifically at 560 Terminal Row there, the only facility here involved) as well as elsewhere in Missouri and in Illinois. During the representative 12-month period ending October 31, 1980, Respondent derived gross revenues exceeding $50,000, in its said business, from transporting merchandise from Missouri directly in interstate commerce to places in other States; and during the same period Respondent performed services valued in excess of $50,000 in States elsewhere than Missouri.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

A resurgence of union organizational activity occurred in Respondent's St. Louis truck terminal in early May 1980, under the leadership of one of its city drivers, Clarence Edward Miller (the Charging Party), who, after rejoining a union (Teamsters Local 600), began soliciting fellow drivers and dockhands to join and execute representational designation cards, and obtained for and returned to the Union in early May about 12 such cards (7 or 8 from drivers and 4 from dockhands).[2] When some

[1] Based on complaint issued on November 22, as amended on December 22, growing out of the charge filed on October 21, 1980.

[2] Earlier in 1980, at a Company-held safety meeting attended by employees with Company Terminal Manager Wilson, Operations Manager

Continued

of those cards, signed without filling in the information called for, were returned to Miller to have the blank spaces filled in, he attended to this. Miller was the only person who passed out union cards on the day shift in the May organizing campaign.

In mid-May or the latter part of May, following a discussion on the Company's loading dock with dockhand Jim Barton, Miller gave Barton four or five union cards for membership solicitation of night-shift employees. Miller's discussion with and handing of the union cards to Barton on the dock were openly conducted in the presence and within earshot of another dockhand, who, after expressly remarking to them that it was "wasting your time" to attempt to unionize this facility, thereupon walked directly into the dispatcher's office, where he was observed talking to Company Operations Manager Drew Cothran in the presence of company dispatcher Mike Pool.

B. *Miscellaneous Alleged "Independent" Violations of Section 8(a)(1)*

According to Charging Party Clarence Miller, Respondent's former city driver, about 15 or 20 minutes after the described episode in which the dockhand was observed talking to Company Operations Manager Cothran in the presence of dispatcher Pool, immediately after Miller was handing union cards to Barton and asking him to solicit night-shift employees to join the Union, in the presence of the dockhand who warned them they were "wasting your time" and thereupon walked over to the dispatch office and talked to Cothran and Pool, Pool summoned Miller to the dispatch office and told him that:

> [T]he dockhand had come in and told [Company Operations Manager] Drew [Cothran] that [you—i.e., Miller—were] giving out the cards and . . . . [d]on't ever mention unions around here because the company hates the union . . . . It's not a good thing to do . . . . Drew Cothran was really mad about it. . . . Drew Cothran was mad about [your] giving out the cards . . . . Don't mention unions around here because the company hates unions.

Charging Party Miller further testified that, also in May, in the drivers' room, while the drivers were talking about unionizing, Company Dock Foreman Ken Weise (Wise), who was standing around, warned them:

> We had to show the people about unions the last time when we had the election and we don't want them because we hate unions. We don't want nothing to do with them. . . . [W]e'd never have one here. . . . Don't talk about unions here. We don't want no part of a union.

Concerning the foregoing, Respondent's dispatcher, Pool, flatly denies making any of the statements ascribed to him, as does its Dock Supervisor Weise, leaving only questions of credibility resulting from their conflicting testimony. After close observation and comparison of the testimonial demeanor of the witnesses in question, I am left with a clearly preponderating preference for the testimony of Miller as described, and I accordingly credit him.

The complaint (pars. 4C and 4D) alleges that in May 1980 dispatcher Pool told an employee that it was the operations manager, i.e., Cothran, who was angry about the distribution of union cards and not to discuss unions with other employees; and that (par. 4E), also in May 1980, Respondent's Dock Foreman Weise likewise told employees not to discuss unions among themselves or with other employees.

Based on my resolutions of credibility founded on comparative testimonial demeanor observations, as indicated, I find these complaint allegations (i.e., pars. 4C, 4D, and 4E established by preponderating substantial credible evidence.[3]

The complaint further alleges (pars. 4A and 4B) that, also in May 1980, an employee was told by company dispatcher Pool to postpone unionization efforts, and was, additionally, interrogated concerning union sentiments of other employees.

These allegations are supported by Respondent's former city driver Robert A. Shelton, who testified that at the conclusion of a company safety meeting—already described in another connection, *supra* fn. 2—he heard city driver Bartlett reply in the affirmative to a question by Company Operations Manager Cothran whether Shelton would be a "likely member or candidate to go with the union." Cothran, supported by Bartlett, in effect denies saying this. Shelton concedes that the Company was well aware, even before this meeting, of Shelton's union sympathies. In view of this concession and the account of that meeting as described and credited *supra* fn. 2, it is apparent that, whether or not Cothran's above

Cothran, and dispatcher Pool, and addressed by Company Vice President of Safety Edwards, city driver Bartlett had informed the group that Miller (the Charging Party here) was advocating unionization of the Company. Testifying as Respondent's witness here, Bartlett concedes he so remarked concerning Miller at the meeting, and that he also characterized Miller (as well as city driver Shelton, who favored unionization) as "trouble"—unlike Bartlett, who opposed unionization. Bartlett further testified that he had heard Miller express prounion views, and that early in 1980 Bartlett had informed Cothran and other company supervisors (as well as drivers) about this, that Bartlett was opposed to unionization, and that management "should be aware of what [is] going on." According to General Counsel witness Dallas Holland, Respondent's city driver, whom I credit, after the aforedescribed safety meeting he heard Bartlett say to Cothran that Miller and Shelton were "both actively trying to get the union in" and that Bartlett "wanted no part of it." Also according to Holland, before he was hired by Respondent in January 1980, Operations Manager Cothran asked him, in the presence of dispatcher Pool, if he was "aware that Overnite Transportation was non-union." This was undisputed by Cothran and Pool. Holland also testified, without dispute, that in March or April 1980 he heard Pool call Miller, to the latter's face, "an old union man" and a "die hard union member," and that Miller was openly referred to among the drivers as the "Overnite shop steward." Holland was still in Respondent's employ at the time he testified here. We have been instructed that in weighing such a witness' credibility, weight should be accorded to that fact and that in testifying he does so at hazard of retaliation from his employer. Cf. *Georgia Rug Mill,* 131 NLRB 1304, 1305, fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962); *Wirtz* v. *B.A.C. Steel Products, Inc., etc., et al.,* 312 F.2d 14, 16 (4th Cir. 1962).

[3] It is to be noted that, in view of Respondent's total denial that any of the described episodes took place, Respondent does not claim that they were in violation of any company rule or that they took place during worktime.

denial is credited, Cothran (as well as others in the Company's management) had openly amply been informed by at least Bartlett of Shelton's union proclivities, so that even if Cothran made the remark to Bartlett attributed to Cothran after the close of the safety meeting, it could not fairly be deemed to rise to the level of coercive or restraintful interrogation at which Section 8(a)(1) of the Act is aimed. Accordingly, I find this allegation of the complaint (i.e., par. 4B) not sustained as violative of the Act.

Later in the same day, however, according to Shelton, he was told by dispatcher Pool that he would be wise not to bring up the union subject now, but, instead, "a couple years or so from now would be a better time."[4] As to the foregoing, Pool testified he does not "believe" he talked to Shelton about the Union, and denies telling anybody to "postpone" unionizing efforts. Based on comparison of testimonial demeanor of Shelton and Pool as closely observed at the hearing, coupled with the imprecise or conclusionary nature of Pool's denials, if that is what they were, I strongly prefer and credit Shelton's described testimony in this aspect over that of Pool. Since I regard Pool's statement to Shelton as coercive and restraintful of employees' exercise of rights guaranteed by Section 7—which need not be delayed or postponed if employees choose not to do so—I find it to have been violative of Section 8(a)(1) of the Act as alleged (par. 4A).

C. *Alleged Violations of Section 8(a)(3) and (1): Discharge of and Failure and Refusal To Recall, Reinstate, or Rehire Charging Party Clarence Miller*

As has already been shown and is undisputed, the leader of the May 1980 unionizing activity in Respondent's St. Louis truck terminal was Clarence Miller—to Respondent's ample knowledge. Unionization of that terminal was strongly disfavored and opposed by Respondent—as was its right, so long as it steered clear of the Act's prohibitions.

Following the episodes which have been described and found, at the end of his run at 4 p.m. on June 6, 1980, Charging Party Clarence Miller was called to the office of Terminal Manager Wilson, who, in the presence of Operations Manager Cothran, terminated him, telling him it was because "business had kind of slowed down," that he was invited to use Respondent as a reference and would receive a favorable reference from it, and that "When business picks up we'll probably call you back."[5] However, he has never been contacted, recalled, or rehired by Respondent, who concedes that he was not terminated for unsatisfactory work performance. Nor, although he has given Respondent as a reference, had he up to the time of this hearing been able to obtain another job.

On the same day as Miller, also at the end of his run late in the afternoon of June 6, 1980, city driver Dallas Holland—who was junior to Miller—was also terminated, with the same explanation as given Miller. Unlike Miller, however, Holland was eventually recalled, and reinstated or rehired by Respondent into his former position of city driver, by telephone call from Operations Manager Cothran, on August 4, 1980—and/or, according to dispatcher Pool's own testimony, by Pool himself—and he has been continued in Respondent's employ in that capacity since that time.

According to Respondent's Terminal Manager Vernon Wilson, Miller and Holland were terminated because of a "serious decline" in company revenues in February through April 1980. According to Wilson, this was a decision from company headquarters in Richmond, Virginia, allegedly issued to Wilson in writing, but for some unexplained reason not produced at the hearing. There is no doubt that Miller and Holland were the least senior of Respondent's St. Louis terminal drivers, Holland being the most junior. According to Wilson, when business "pick[ed] up" at the St. Louis terminal in late July or early August, Holland—junior to Miller—was recalled and rehired as a city driver. Wilson concedes that six additional city drivers were hired in September-November 1980 (four new hires and two by reclassification from dockhands), still without recalling Miller. According to undisputed, credited testimony of city driver Holland—Respondent's most junior driver at the time he was terminated with Miller on June 6, who was recalled and reinstated or reemployed on August 4, although city driver Miller, was not—Holland worked steadily thereafter full time in August and September, and from the end of September to Christmas there was an "enormous" amount of overtime, with city driver Bartlett working around 50 hours a week.

Respondent's defense to this aspect of the case must be considered in two parts—first, Respondent's explanation for Miller's termination; and, second, its explanation for its failure and refusal to recall, reinstate, or rehire Miller. It is appropriate to assess those explanations, since General Counsel has made out a *prima facie* case of a violation of Section 8(a)(3) and (1) based on its actions against Miller, concededly a satisfactory employee distinguished only by his leadership of that unionizational attempt which was so displeasing to Respondent, and who was terminated in the midst of that effort, thus nipping it in the bud and also serving as a warning to like-minded fellow employees. These circumstances properly shift to Respondent a duty of explanation. Cf. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

With regard to its termination of Miller and Holland, Respondent asserts that they were the two most junior of its St. Louis city drivers, and that their termination was required by economic necessity. Miller and Holland were indeed the most junior of Respondent's drivers, with Holland the more junior of the two. Respondent's defense of economic necessity consists only of some conclusionary, nonfactual testimony by its Terminal Manager Wilson (who testified that he himself apparently disagreed with the determination of his head office to termi-

[4] Shelton was subsequently discharged, early in September 1980. Although in his estimation he was fired "for no reason at all," the propriety of his discharge is not involved in the instant proceeding. I have taken that discharge and Shelton's possible animus against Respondent into consideration in assessing his credibility.

[5] For 3 or 4 weeks prior to this, Miller had worked only 4 days or only 5- to 6-hour days per week. His normal workweek had been 40 hours, Monday through Friday.

nate two drivers, but was overruled from that office in Richmond) supplemented by some unexplained, crude, conclusionary alleged figures on a form called "Revenue Report," for January-October 1980 only (Resp. Exhs. 23–32). In assessing these, it is to be noted that they are unexplained or unsupported by any original records or books of entry produced at the hearing (nor is there any explanation for the failure to produce those at the hearing); that the alleged figures by themselves are not meaningful without surmise and speculation;[6] that no comparative figures have been supplied for any preceding period, for comparison purposes; that no data of any nature have been provided with regard to work force levels, in terms of "bills," "total weight," "quota," "revenue quota," or otherwise, to show relationship (i.e., stability, rise, or decline) of the work force during any other period, for comparison purposes with the period here; that the figures themselves may be regarded as quite equivocal, susceptible to variable interpretation; that the alleged data are unsworn; and that the alleged data in and of themselves do not establish justification *per se* for the termination of the two city drivers.

Nevertheless, the alleged data in question were not objected to and were therefore received in evidence. Since neither the accuracy nor the meaningfulness of the data was called into question by General Counsel at the hearing, it will be assumed for purposes of this proceeding that they establish, *prima facie*, justification for the termination of Miller and Holland, Respondent's most junior city drivers at its St. Louis terminal, for economic reasons, even though, for reasons generally expressed above, I am far from satisfied that they do.

We proceed accordingly to that aspect of Respondent's defense consisting of its alleged justification for failing to recall, reinstate, or rehire Miller, concededly a satisfactory employee distinguished only by his leadership of the disfavored unionizational activity at its St. Louis terminal.

It will be recalled that Miller was not the most junior of Respondent's St. Louis city drivers; Holland was. Yet Holland was recalled, and, in addition to Holland, six other city drivers were hired thereafter before the end of 1980, with Miller not recalled, reinstated, or rehired.

Respondent attempts to distinguish away its recall, reinstatement, or rehire of Holland from its failure to accord similar treatment to Miller, who was concededly a satisfactory driver and senior to Holland, on the alleged basis that, unlike Miller, Holland telephoned in regularly seeking his job back. However, I credit Miller's testimony that he was explicitly told by Terminal Manager Wilson at the time of his termination that Respondent would probably recall him "when business picks up" (which it concededly did), and that neither Wilson nor Cothran suggested that he must stay in contact with Respondent. Furthermore—contrary to Respondent's denials, which I absolutely discredit—Respondent was well aware, from Miller's June 1980 unemployment insurance benefits application and subsequent payments (for 39 weeks thereafter) which it concededly did not oppose,[7] as well as from at least one reference inquiry from a prospective employer (Jefferson County) to whom Miller had applied for a job, that Miller was looking for employment. I discredit Pool's assertions at the hearing that Miller informed him when he came in around June 13 for his final paycheck that he had obtained another job. I cannot apprehend why any person would lie about having another job, when in fact he had none, and thereby cut himself off from the prospect of recall to a job he needed and would presumably have been recalled to.[8] And certainly thereafter Respondent well knew from Miller's unemployment insurance benefits application and payments, which it did not oppose, as well as from at least one job reference inquiry, that Miller remained unemployed. It is further to be noted that when Respondent recalled, reinstated, or rehired Holland, it was *Respondent itself* (according to its own testimony) who telephoned Holland and recalled him to work—even though, in Holland's case, Holland was working in another job; Respondent could just as readily have done so with Miller (who had no other job). Moreover, although according to Wilson's testimony Miller would have been rehired—*even if* Miller had another job (as Holland, who was recalled, did)—if Miller had indicated any interest in recall, in response to a question at the hearing Wilson flatly declared, without any reason, that Respondent would *not* restore Miller to its employ now even though Miller wants it and Respondent allegedly first learned at the hearing itself that he is still unemployed.

Overall, accordingly, Respondent's alleged "reason" for not recalling, reinstating, or rehiring Miller "fails to stand under scrutiny" (*N.L.R.B.* v. *Thomas W. Dant, Robert E. Dant, et al., d/b/a Dant & Russell, Ltd.*, 207 F.2d 165, 167 (9th Cir. 1953)). Respondent was concededly satisfied with Miller's work performance. Respondent was concededly well aware of Miller's leadership in union organizational activity, which it disfavored and toward which it was openly hostile (as was its right). While I find, on the record presented, Respondent's "economic necessity" defense for Miller's termination factually unrebutted, at any rate Respondent's explanation for its failure and refusal to recall, reinstate, or rehire Miller does not hold water. While not recalling Miller, Respondent recalled Holland, who was junior to Miller, and it then added six more city drivers to its work force, still without recalling Miller. And at the

[6] For example, "total bills" affords no clue as to the size, quantity, nature, or profitability of the shipments involved; nor is any clue afforded as to the relationship between "bills" and shipment, receipt, or delivery dates; "average revenue" affords no clue as to how it is calculated, and with what offsets and deductions unrelated to quantity of business; the highly ambiguous and conclusionary word "quota" is wholly unexplained, as is "revenue quota," and, likewise, the word "revenue."

[7] Although Respondent attempts to explain this away by asserting that its employees' unemployment insurance benefits applications are handled for it elsewhere, Respondent's Terminal Manager Wilson conceded that they are handled by an agent of Respondent; and that in forwarding Miller's unemployment insurance benefits application to that agent, Respondent in no way indicated it should be opposed or contested. This belies Respondent's alleged "belief" that Miller had promptly secured other employment after his termination.

[8] Based on testimonial demeanor observations, I strongly discredit Pool's testimony that Miller indicated to him he would not return to Respondent's employ because he disliked the Company, which he (according to Pool, whom I do not believe) characterized with an obscene expletive.

hearing itself Respondent persisted, without explanation, in its refusal to take Miller back. Respondent's failure and refusal to recall and reemploy Miller is rationally accountable, on the record presented, only in terms of its animus against Miller because of his leadership in his highly disfavored unionizational activities.

It is accordingly found and concluded, on the record as a whole, that the true reason for Respondent's failure and refusal to recall, reinstate, and reemploy Miller, a seasoned satisfactory employee, was his union and protected concerted activities under the Act; and that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings and the entire record, I state the following:

CONCLUSIONS OF LAW

A. Jurisdiction is properly asserted here.

B. Through its actions in interference with, restraint, and coercion of employees' rights under Section 7 of the Act to discuss union affiliation among themselves and with other employees, and to solicit other employees to join a union through distribution and signing of union affiliation cards, as well as its admonitions to employees concerning its displeasure at those actions and to postpone their unionization efforts, as described and found in section "III,B, *supra*, Respondent has, as alleged in paragraphs 4A, 4C, 4D, and 4E of the complaint, violated Section 8(a)(1) of the Act.

C. Through its failure and refusal to recall, reinstate, and rehire Clarence Miller (also known as Clarence Edward Miller) as a city driver at its St. Louis, Missouri, terminal, on and at all times since August 4, 1980, under the circumstances described and found in section III,C, *supra*, and as in part alleged in paragraphs 5B and 5C of the complaint, Respondent has discriminated and continues to discriminate in regard to hire or tenure of employment and terms or conditions of employment to discourage membership in a labor organization, and has thereby violated and continues to violate Section 8(a)(3) of the Act; and has, further, thereby interfered with, restrained, and coerced employees, and continues so to do, in the exercise of rights guaranteed in Section 7, thereby violating Section 8(a)(1) of the Act.

D. The aforesaid violations and each of them constitute unfair labor practices which have affected, affect, and, unless permanently restrained and enjoined and otherwise appropriately remedied, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

E. It has not been established by substantial credible evidence upon the record as a whole that, as alleged in paragraph 4B of the complaint, Respondent interrogated an employee in May 1980 in violation of Section 8(a)(1) of the Act.

F. It has not been established by substantial credible evidence upon the record as a whole that, as alleged in paragraphs 5A and 5C of the complaint, Respondent's termination of the employment of Clarence Miller on June 6, 1980, was in violation of Section 8(a)(3) or (1) of the Act.

REMEDY

Having interfered with, restrained, and coerced employees in the exercise of rights guaranteed to them under Section 7 of the Act, Respondent should, as is usual in such cases, be required to cease and desist from such violations. Having also failed and refused to recall, reinstate, and rehire an employee for discriminatory and retaliatory reasons because he exercised rights guaranteed to employees under the Act, thereby discouraging union membership and also interfering with, restraining, and coercing him as well as other employees in the exercise of those rights, Respondent should further be required to offer that employee immediate, full, and unconditional recall, reinstatement, and reemployment to his former job, as of August 4, 1980 (the date when it recalled a junior employee to a like job) and to make him whole for any wages, accruals, and benefits (including vacations and vacation pay, and hospitalization and other medical benefits, with reimbursement for any expenditures or indebtednesses incurred by reason of any cancellation, lapse, or withdrawal of any applicable insurance policy or coverage thereunder) lost or reduced and which may be due, as of and since August 4, 1980, plus interest, and with restoration of seniority, all as determinable in a supplemental proceeding if necessary. Sums and interest due shall be computed as explicated in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); and *Florida Steel Corporation*, 231 NLRB 651 (1977). Respondent should also be ordered to refrain from informing any employer, prospective employer, or character, credit, or other reference seeker concerning Clarence Miller, that he was not recalled to, reinstated, or rehired by Respondent because of union or other protected concerted activity. Respondent should further be required to preserve and make available to the Board's agents its books and records for compliance determination purposes; and to post the usual informational "Notice to Employees." In view of the seriousness of Respondent's violation in failing to recall, reinstate, and rehire a satisfactory employee singled out for reprisal only because he engaged in a leadership role in lawful activities guaranteed to employees by Congress under the Act, attenuated by Respondent's persisting refusal even at the hearing of this proceeding to reemploy him under the circumstances described, betokening a seeming attitude of disregard for and even of attempting to thwart federally guaranteed rights, a broad cease-and-desist order is in my opinion called for.[9]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:

[9] See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979); cf. *A. J. Krajewski Manufacturing Co., Inc.*, 180 NLRB 1071 (1970); *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

ORDER[10]

The Respondent, Overnite Transportation Company, St. Louis, Missiouri, its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

1. Directing, admonishing, warning, or informing employees, in violation of Section 8(a)(1) of the Act, to postpone their unionization efforts or activities.

2. Warning, admonishing, or informing employees, in violation of Section 8(a)(1) of the Act, that Respondent or its officials are angry over employees' lawful distribution of cards soliciting other employees to affiliate with a union or to represent them in collective bargaining.

3. Directing, warning, admonishing, or informing employees, in violation of Section 8(a)(1) of the Act, not to engage in lawful discussions among themselves or with other employees concerning unions, unionization, or unionizational activities.

4. Discriminating in regard to hire, tenure, or any term or condition of employment to discourage or encourage membership in any labor organizatlon, by failing or refusing, in violation of Section 8(a)(3) of the Act, to recall, reinstate, or rehire any employee into its employ because he or she has engaged in union or other protected concerted activities lawful under the Act; or for that reason interfering with, restraining, or coercing any employee, in violation of Section 8(a)(1) of the Act, in the exercise of any right under Section 7 of the Act.

5. In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

B. Take the following affirmative actions, necessary to effectuate the policies of the Act:

1. Offer to Clarence Miller (also known as Clarence Edward Miller) immediate, full, and unconditional reinstatement to his former job of city driver with Respondent at its St. Louis, Missouri, terminal (or, if not available, substantially equivalent employment with Respondent), without prejudice to his seniority and other rights, privileges, wages, benefits, and emoluments, including but not limited to any and all wage and pay scale increases and progressions as if he had been recalled, reinstated, and rehired on August 4, 1980; and make him whole for any loss of income (including overtime, holiday and vacation pay, and reimbursement for all hospitalization, surgical, medical and other payments or obligations which may have been incurred by reason of his nonreinstatement to such employ on and since August 4, 1980), together with interest, in the manner set forth in the "Remedy" section of this Decision.

2. Refrain from stating to any employer, prospective employer, employment agency, reference seeker, or character or credit inquiry, that Clarence Miller was not recalled, reinstated, or rehired into Respondent's employ because of any union or other protected concerted activity under the Act.

3. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, wage rate records, overtime records, records of employees hired and terminated, records of jobs held by and payment made to employees, and all work schedules, freight records, personnel records and reports, social security records, insurance records, and all other records necessary or appropriate to determine the amounts of backpay and other sums due as well as the adjustment of seniority required under, and the extent of compliance with, the terms of this Order.

4. Post at its premises in St. Louis, Missouri, copies of the notice attached hereto marked "Appendix."[11] Copies of said notice, on forms provided by the Board's Regional Director for Region 14, shall, after being signed by Respondent's authorized representative, be posted in said premises by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

5. Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply therewith.

IT IS FURTHER ORDERED, that in all respects not herein found to have constituted violations of the Act, the complaint herein dated November 24, as amended December 22, 1980, be and it is hereby dismissed.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order which follows herein shall, as provided in Sec. 102.48 of those Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."